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MICHAEL P. DACQUISTO
Chapter 7 Trustee
PO Box 992631
Redding, California 96099-2631

Telephone: (530) 244-6267
Fax: (530) 244-0907

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA**

In re: NO. 09-36559-C-7

**PATRICK STEVEN DOW, NICOL
MARIE DOW** DCN: MPD-1

Debtors

Date: March 9, 2009
Time: 9:30 a.m.
Place: Courtroom 35, Dept C
501 I Street, 6th Floor
Sacramento, CA 95814

**MOTION FOR AUTHORIZATION (1) TO SELL THE DEBTORS' INTEREST IN REAL
PROPERTY DESCRIBED AS BARE LAND WITH OUT BUILDINGS LOCATED AT 171
RUIZ ROAD, BERRY CREEK, CALIFORNIA, BUTTE COUNTY APN 061-550-009
FREE AND CLEAR OF LIENS AND (2) TO PAY COSTS OF SALE AND LIENS OF
RECORD**

Michael P. Dacquisto (hereafter "Dacquisto") the chapter 7 trustee in this case submits the following for the court's consideration in connection with his motion for authorization (1) to sell the debtors' interest in real property described as bare land with out buildings located at 171 Ruiz Road, Berry Creek, California, Butte County APN 061-550-009 free and clear of liens for \$51,500.00 and (2) to pay costs of sale and liens of record.

I. STATEMENT OF FACTS

28 These proceedings were instituted when the debtors Patrick Steven Dow and Nicol

1 Marie Dow filed their petition under the United States Bankruptcy Code on August, 5, 2009.
2 Dacquisto was appointed the Chapter 7 trustee.

3 At the time the bankruptcy was filed the debtors had accepted an offer from
4 Steamboat Ranch Capitol Investments, LLC (hereafter "Buyer") to purchase their interest in
5 real property described as bare land with out buildings located at 171 Ruiz Road, Berry
6 Creek, California, Butte County APN 061-550-009 for \$51,500.00. Because of the
7 bankruptcy filing the sale could not close without court approval. A creditor, Kevin Larson,
8 (hereafter "Larson") had recorded an abstract of judgment against the real property on June
9 18, 2009 which would have taken all of the net sales proceeds.

10 After filing their petition the debtors, Dacquisto and Larson reached an agreement.
11 Larson would allow the sale and withdraw its abstract of judgment, Dacquisto would obtain
12 court approval for the sale and the debtors would amend their schedules to allow the
13 bankruptcy estate to receive \$15,000.00 from the net sales proceeds and would only claim
14 their exemption in the net sales funds remaining after deductions as set forth below.

15 On this basis Dacquisto has agreed to proceed to obtain court approval of the offer
16 from Buyer, subject to potential overbid. Dacquisto understands the Buyer is not related to
17 the debtors in the instant bankruptcy estate. From the sales price of \$51,500.00 deductions
18 of (1) approximately \$750.00 for closing costs and other miscellaneous fees, (2)
19 approximately \$33,800.00 for a note in favor of Joel and Maria Setzer secured by a deed of
20 trust recorded against the property, (3) approximately \$3,000.00 for unpaid property taxes,
21 (4) \$15,000.00 to the bankruptcy estate, and the remaining money, approximately \$1,950.00
22 to the debtors for their exemption.

23 Dacquisto believes this price is at or near the present maximum obtainable sale price
24 for the real property. Failure to sell at this price and time may result in detriment to the
25 estate, rather than gain. Delay may result in diminution in value of the property and
26 potentially increased holding costs.

27 Under the real estate sales contract there is no commission being paid to any real
28 estate broker. The sales contract also requires payment of certain customary costs of sale

1 and payment of liens of record. Dacquisto requests authorization for payment of those items
2 from the sales proceeds.

3 **II. MEMORANDUM OF POINTS AND AUTHORITIES**

4 **A. THIS COURT HAS AUTHORITY TO AUTHORIZE THE SALE OF ASSETS**
5 **OUTSIDE THE ORDINARY COURSE OF BUSINESS UNDER 11 U.S.C. §363(b)(1).**

6 Title 11 U.S.C. §363(b)(1) provides:

7 "The trustee, after notice and a hearing, may use, sell, or lease,
8 other than in the ordinary course of business, property of the
9 estate." (11 U.S.C. §363(b)(1))

10 This court's power to authorize the proposed sale under 11 U.S.C. § 363(b) is to be
11 exercised in its discretion. *In re Lionel Corp.* 722 F.2d 1063, 1069 (2d Cir. 1983); *In re*
12 *Coastal Cable T.V., Inc.* 24 B.R. 609, 611 (Bankr. 1st Cir. 1982), rev. on other grounds, 709
13 F.2d 762 (1st Cir. 1983); *In re Baldwin United Corp.* 43 B.R. 888, 905 (Bankr. S.D. (Ohio
14 1984); *In re Ancor Exploration Co.* 30 B.R. 803, 808 (Bankr. N.D. Okla. 1983).

15 In *Lionel*, *supra*, a standard was established against which to measure the court's
16 judicial exercise of its discretionary powers to approve a sale of assets outside the ordinary
17 course of business under 11 U.S.C. §363(b). The *Lionel* court held that for the court to
18 exercise proper discretion, a good business reason must be shown. Further, the court stated
19 the discretionary power was available to further the interests of the debtor, its creditors, and
20 its equity security holders. *Id.* at 1071.

21 The *Lionel* decision was adopted by the Ninth Circuit Bankruptcy Appellate Panel in
22 *Walter v. Sunwest Bank (In re Walter)*, 83 B.R. 14 (Bankr. 9th Cir. 1988), which approved
23 language that the trustee must demonstrate a good business reason for selling the property.

24 In this case Dacquisto has sound business reasons for selling the property. He will be
25 able to liquidate an asset and create a fund out of which creditors will be paid. The price
26 being paid for the property is fair and reasonable. Selling now prevents further delay,
27 possible decrease in property value and potential additional costs associated with continued
28 holding of the property. Under these circumstances this court's approval of the proposed

1 sale would be a sound exercise of its discretion.

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3 **B. THIS COURT HAS AUTHORITY TO AUTHORIZE THE SALE BE MADE FREE
AND CLEAR OF LIENS UNDER 11 U.S.C. §363(f).**

4 Title 11 U.S.C. §363(f) allows a sale free and clear of liens only if (1) permitted by
5 non bankruptcy law, (2) the lien holders consent to such sale, (3) the proposed purchase
6 price exceeds the total value of the liens against the property, (4) a good faith dispute
7 concerning the validity of the liens exists, or (5) in a judicial proceeding the lien holders are
8 compelled to accept a money satisfaction of their interest.

9 Here the proposed sale satisfies the third condition with respect to the real property
10 tax liens of Butte County and with respect to the note secured by a deed of trust in favor of
11 Joel and Maria Setzer because the purchase price exceeds the total value of those liens.
12 With respect to the lien created by the abstract of judgment recorded by Kevin Larson,
13 because he consents to the sale the second condition of the statute is satisfied. If he did not
14 consent, the fourth condition of the statute would apply because the abstract of judgment
15 was recorded less than 90 days before the bankruptcy petition was filed making it subject to
16 avoidance by Dacquisto and therefore a good faith dispute concerning its validity would
17 exist. For these reasons the sale should be made free and clear of liens.

18 **III. CONCLUSION**

19 For all the reasons set forth above Dacquisto respectfully requests the following relief
20 from this court.

21 1. An order authorizing him to sell the property under the terms and conditions
22 set forth above and in the real estate sales contract;

23 2. An order authorizing him to sign all documents necessary or convenient to
24 complete the sale;

25 3. An order authorizing payment of costs, liens and other items all as set forth
26 above, from the sales proceeds, including a provision that the debtors' exemption payment
27 not be made until the sale has closed and they have vacated the property;

28 4. That no further motion or order from this court be required to complete the

1 sale; and,

2 5. For any further relief the court deems appropriate.

3 Date: January 28, 2010

4 /s/ Michael P. Dacquisto
MICHAEL P. DACQUISTO
5 Chapter 7 Trustee

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